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BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 435.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, ET AL.,
Petitioners, and Appellants Below,

v.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, ET AL.,
Respondents, and Appellees Below.

PETITION FOR A RECONSIDERATION OR REHEARING.

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PETITION FOR A RECONSIDERATION OR REHEARING.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Come now the petitioners herein, respondents and appellees below, and present this petition for a reconsideration or rehearing, and for the vacating of a judgment reversing in a per curiam decision the judgment of the lower court.

JURISDICTION.

On the 6th day of December, 1943, the Court entered the following order in the case of *Brotherhood of Railway and Steamship Clerks, et al.* v. *United Transport Service Employees of America, et al.*, No. 435, October Term, 1943:

> "*Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on the authority of General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.; General Committee of Adjustment v. Southern Pacific Company; General Grievance Committee v. General Committee of Adjustment; and Switchmen's Union of North America v. National Mediation Board, Nos. 23, 27, 41 and 48, respectively, decided November 22, 1943."

This petition for a reconsideration or rehearing is filed within twenty-five days from December 6, 1943, in accordance with Rule 33 of this Court.

REASONS FOR PETITION FOR RECONSIDERATION OR REHEARING.

The original cause of action in the District Court of the United States for the District of Columbia was brought by the United Transport Service Employees of America, an unincorporated labor organization, and a number of individual employees of the Saint Paul Union Depot Company against the National Mediation Board in which cause the Brotherhood of Railway and Steamship Clerks, Freight-handlers, Express and Station Employees, et al., were allowed to intervene. The pleadings revealed that about forty-five station porters (redcaps) in the employ of the Saint Paul Union Depot Company, Saint Paul, Minnesota, after organizing as a local chapter of the respondent appellee, the United Transport Service Employees of America, (hereinafter called the "United") applied to their employer for the execution of a working and wage agreement and joined with the "United" in requesting recognition of

the "United" as their bargaining agent. The intervenors, the Brotherhood of Railway and Steamship Clerks (hereinafter called the "Brotherhood") took the position that the redcaps were covered by a working agreement between the employer and the Brotherhood, entered into in 1921.

The Mediation Board's services were invoked to investigate this dispute over the representation. The Board dismissed the application on the ground that station porters "are part of the craft or class of clerks, office, station and storehouse employees and not a separate craft or class for the purposes of the Railway Labor Act and that 'no dispute over representation has been found by the Board to exist among the craft or class of * * * (such employees in the services of the company).' "

Certain conceded facts are important as a background to this petition. The working agreement entered into in 1921 between the Saint Paul Depot Company and employees represented by the Brotherhood (1) did not list station porters or "redcaps"; (2) the Saint Paul redcaps at no time designated the Brotherhood as their bargaining agent but in fact unanimously so designated the United; (3) the Mediation Board has recognized the United as a craft or class organization, acting for redcaps either by actual certification to or through knowledge of executed agreements with upwards of twenty-one railroads and station companies; (4) the Saint Paul redcaps are all colored and because of this are not eligible for membership in the Brotherhood.

In spite of the foregoing, as above indicated the Mediation Board dismissed the application of these redcaps for a bargaining agent of their own choosing, and relegated them to a voiceless minority in a craft or class in which they were not previously and are not now recognized, and designated for them as a bargaining agent a brotherhood to which they cannot belong and in which they have absolutely no voice.

This petition for a reconsideration or rehearing constitutes a final appeal for relief from a judgment by this

Court sustaining an administrative determination that has been and will be used to restrain the exercise by certain railway employees of basic constitutional rights, and is made for the purpose of pointing out additional circumstances and of stressing distinctions between this case and those which were cited by this Court as determinative of the issues involved. In granting certiorari and reversing the judgment of the Court of Appeals of the District of Columbia, this Court without hearing from the respondent appellees gave a per curiam decision on the authority of the four cases hereinbefore referred to, all of which were decided on the 22nd day of November, 1943; which said decision, with apparent lack of concern as to constitutional questions raised, took the position that the courts were without jurisdiction to determine the correctness of the position of the Mediation Board, and that the decision of the Mediation Board was final and conclusive.

It is to be noted that the question of jurisdiction in this case had not been raised by the petitioners seeking certiorari and also it is to be noted that the Mediation Board, the original party to this suit, did not take an appeal from the United States District Court for the District of Columbia to the Court of Appeals for the District of Columbia, and the Government was not a party in interest on this application.

We respectfully submit that the *Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees of America* case is not ruled by the four cases referred to in this Court's per curiam decision, nor by any of them. The assumption of jurisdiction by the District Court of the United States for the District of Columbia, and the affirming of that position by the Court of Appeals for the District of Columbia, are as a matter of fact reasonably sustained by language taken from the four cases referred to, from which cases the instant case is distinguishable and the view taken by this Court in those cases does not compel a conclusion that the findings made by the Mediation Board

in the present case are not subject to review by the Federal Courts.

With these distinctions properly drawn a different result than that occasioned by this Court's per curiam decision can be reached without harm to any pronouncements of this Court in any of the cases cited or in any previous case. The instant case, unlike the cases cited, involved not only the question of the validity of the Board's determination as to what constituted the "craft or class", but the far more important and constitutional question as to the right of the petitioners to be protected against an effective and arbitrary denial of *their right to organize and bargain collectively through representatives of their own choosing.* Section 2(4th) Railway Labor Act. The Missouri-Kansas-Texas Railway Company case did not involve the basic right granted by Section 2(4th) of the Act. In that case this Court said:

> "Section 2(4th) states that employees shall have the right to organize and bargain collectively through representatives of their own choosing. But that *great right* which Congress in 1926 at last supported with legal sanctions *is not challenged* here. The Engineers and Firemen are the collective bargaining agents for their respective crafts and are acknowledged as such. Their authority so to act is not challenged. (64 Sup. Ct. 146, 151.)" (Italics ours.)

The Southern Pacific Company case did not involve a denial of the right to bargain collectively through representatives of their own choosing, as this Court cogently remarks:

> We are concerned only with a problem of representation of employees before the carriers in certain types of grievances which, though affecting individuals present a dispute like the one at issue in the Missouri-Kansas-Texas Railway Co. case. It involves, that is to say, a jurisdictional controversy between two unions * * * For the reasons stated in our opinions in the Missouri-Kansas-Texas Railway Co. case and the

Switchmen's Case, we believe that Congress left so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. (64 Sup. Ct. 142, 145.)

The controversy in the Switchmen's case centered around the authority of the Mediation Board in election disputes to interpret and define the meaning of "craft or class" as used in the Railway Labor Act. It is not denied that the rights granted employees under Section 2(4th) are possibly involved in the issues of the Switchmen's case inasmuch as the right of a majority of any class or craft of employees to choose who shall be the representative of the class or craft is enforced by the powers given the Board under Section 2(9th) to resolve controversies and as an incident thereto to determine what is the appropriate class or craft in which an election should be held. However, the petitioners contend that the said Switchmen's case does not involve the basic issue of the case at bar—the denial of the right to participate in the selection of the bargaining representative.

Petitioners contend that the findings of the Mediation Board in the instant case deprive the petitioners of basic rights under the Railway Labor Act, making the cases referred to either distinguishable, as hereinbefore outlined, or raising the unquestionable issue that the Railway Labor Act itself is unconstitutional if, under its terms, there be a delegation of uncontrolled and uncontrollable authority in the hands of the Mediation Board of fundamental constitutional rights of persons situated as are these petitioners. Under the Railway Labor Act it is clear that the petitioners as employees have the right to organize and bargain collectively through representatives of their own choosing. 45 U. S. C. A., Section 152, 4th. In the case of *Texas & New Orleans Railway Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 569, this Court, through Chief Justice Hughes, stated:

> "Freedom of choice in the selection of representatives on each side of the dispute is the *essential foundation of the statutory scheme.* All proceedings looking to amicable adjustments and to agreements or arbitration of disputes, *the entire policy of the Act,* must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained." (Italics ours.)

Although this Court has cited the *General Committee of Adjustment* v. *Missouri-Kansas-Texas Railway Company* as authority for the reversal of the Court of Appeals for the District of Columbia in the instant case, in that very case this Court, in speaking of the freedom of choice in the selection of representatives, said:

> "* * * What has long been a *'right'* of employees enforceable only by strikes and other methods of industrial warfare emerged as a *'right'* enforceable by judicial decree." (Italics ours.)

In the Switchmen's case before referred to the Court observed that the right of a craft or class of employees to select a bargaining representative is not protected by the Courts, but is protected by the powers granted to the Mediation Board under Section 2(9th) under the Railway Labor Act.

In the Switchmen's case there was no question that all of the employees concerned, those members of the Switchmen's Union as well as those members of the Brotherhood of Railway Trainmen, were doing absolutely the same type of work. In the principal case the Redcaps were doing an entirely different type work from that covered traditionally under the jurisdiction of the Brotherhood of Railway and Steamship Clerks. Nevertheless, without a hearing or any opportunity for the Redcaps to establish the differentiation and without any regard to the consequences that it was linking together a minority with an antagonistic

majority, the Mediation Board issued its fiat, placing the Redcaps under the jurisdiction of the Brotherhood as coming within the same craft or class over which the Brotherhood had jurisdiction. The Board never held an election; never interviewed, or in any wise communicated with a single Redcap whose vested property rights in his job by its decision have been placed at the uncontrolled discretion of the Brotherhood which will not recognize him as a member.

It is respectfully urged that an arbitrary designation by the Mediation Board cannot be substituted for the basic right of free selection entrusted to the care of the Board under Section 2(9th), and we further urge that the effect of the Court's decision in the case at Bar is to thwart the very purpose of the Railway Labor Act, and to rob it of its vitality by sustaining the Mediation Board in a failure and refusal to allow to persons invoking its aid the very rights which the Act was created to insure.

Again as seeming to lay the premise for the distinction between the Switchmen's case and the instant case, this Court in the Switchmen's case has said:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in Texas & N. O. R. Co. v. Brotherhood of Ry. and S. S. Clerks, 281 U. S. 548, and Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in Section 2, Fourth writes into law the 'right' of the 'majority of any craft or class of employees' to 'de-

termine who shall be the representative of the craft or class for the purposes of this Act.' That 'right' is protected by Section 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. See Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. 2d 757; Brotherhood of Railroad Trainmen v. National Mediation Board, 135 F. 2d 780. A review by the federal district courts of the board's determination is not necessary to preserve or protect that 'right'. Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. *All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced.* (Italics ours.)

Can it be denied that in the instant case that if jurisdiction be not allowed to the Federal Courts that there is an attendant sacrifice or obliteration of a right which Congress has created? If the premise be that Congress has the right to determine how the rights which it creates shall be enforced only when all constitutional questions are aside, to use this Switchmen's case as a parallel or a precedent to deny to the Courts the right to review the decision of the Mediation Board in the instant case would be to shut our eyes to the very gist of the present action and to avoid the fundamental issues raised. It is to be noted that the question of the constitutionality of the action of the Board was made a part of the pleadings as well as the proof in the instant case. Quotations from the pleadings will evidence this foundation:

"* * * The plaintiffs also urge that the act and actions of said National Mediation Board herein complained of are not only aribitrary, capricious and unlawful

> under the terms of said Act of Congress, but they do not meet the requirements of due process of law and violate the rights of plaintiffs guaranteed to them by the Constitution of the United States. * * * Plaintiffs aver that the constitutional rights of the plaintiffs in question are violated by the action of the National Mediation Board as herein outlined and specifically, but without limiting the foregoing, the rights as assured them under the Fifth and Fourteenth Amendments to the Constitution of the United States."

Where a constitutional right is invaded it is not necessary for the Congress to bestow a procedural right on any individual or individuals to protect its or their constitutional rights, and if such rights are taken away under the guise of legislation, that legislation is unconstitutional and the only way that those rights may be vindicated is through the courts. We so maintain in this case. It seems thus that the decision in this case decided on August 2, 1943, by the Court of Appeals, makes this so manifest that nothing further on our part should be said, but in view of the Supreme Court's decision we deem it necessary to differentiate this case from those cases relied on by the Supreme Court.

In this connection we invite your attention to Chief Justice Eicher's reasoning in concluding his opinion in affirmation of the lower court:

> "The opinion of this Court in National Federation of Railway Workers v. National Mediation Board, 71 App. D. C. 256, is without bearing on the issue presented to us in the instant case. The coach cleaners there concerned were deprived of no statutory rights, by either the government or their employers. The designated representative, it is true, was a labor organization to which some of the coach cleaners could not belong, but it became the designated representative because a majority of the coach cleaners voted for it and it could continue only so long as they desired it."

It will be noted there that the persons in interest had an opportunity and did take part, and by their majority ex-

pressed their preference for the labor organization other than the National Federation of Railway Workers.

In the instant case the parties in interest unanimously voted for the United Transport Service Employees of America to act as their bargaining agent, but the decision as now reversed by the Supreme Court of the United States would mean that the Brotherhood of Railway & Steamship Clerks should become their bargaining agent, not only without, but in the teeth of this exercise of franchise, and denying due process of law to them as indicated by the decision handed down by Chief Justice Eicher—

> "As we have pointed out, however, the record raises questions of law and fact that deserve better than cavalier disposition by both the administrative and the courts, and the parties are entitled to have them determined in accordance with the due processes of law.
> "The judgment of the District Court is correct and is therefore affirmed."

Should there be any doubt as to these forty-five employees not having their day in court and due process of law also denied to them, reference is had to the concurring opinion of Chief Justice Groner.

Chief Justice Groner, after stating the factual angle of the case, makes this important and further statement:

> "* * * But I think that neither that question nor the question of the precise or exact meaning of the words 'craft or class' and of whom they shall be composed, needs to be decided in this case. And this for the reason that here there is admitted to exist a totally different situation from any contemplated by the Act, and which, so far as I know, is unique. And this grows out of the fact, as we have seen, that the Brotherhood, designnated by the Board as the bargaining agent of the porters, is a white organization which does not permit membership by the colored employees of the railroads. As a result, the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in

its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. That the rules of the Brotherhood make Negroes ineligible to membership is not a matter which concerns us, but that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary. The purpose of the Act, as is apparent on its face, and as has been recognized and confirmed by the Supreme Court and this Court in many decisions, is to insure freedom of choice in the selection of representatives. While it is true that this purpose has been held to yield, when necessary, in the interest of uniformity of classification in accordance with established custom, nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association. It is, therefore, of no consequence that the porters were at one time dependent upon Brotherhood as their Spokesman with the railroad, for that never was a trusteeship of their own making. To perpetuate it by law would be to impose a tyranny in many respects analagous to 'taxation without representation.' And if anything is certain, it is that the Congress in passing the Act never for a moment dreamed that it would be construed to diminish the right of any citizen to follow a lawful vocation on the same or equal terms with his neighbor. In this view, to enforce the Board's decision would be contrary to both the word and spirit of our laws."

This language in the concurring opinion of Chief Justice Groner so clearly differentiates this case from the cases relied on by the Supreme Court for the overruling of this case that the very statement of it is all that need be said. Couple this with the Supreme Court's decision to the effect that the Statute never intended to take away the rights of

individuals to make their own contracts, and the further statement of Mr. Chief Justice Groner—

> "* * * Individually and as members of that organization they duly requested the Depot Company to enter into a working agreement with United in their behalf, and when this was denied invoked the mediation of the Board. * * *"

This shows, if the ruling of the Supreme Court stands in this case, it not only denies to these forty-five members the right to collectively make their own contract, but it denies to them the individual right to make their own contract, and if Congress passed such a law, clearly the law would be unconstitutional and certain it is that the Mediation Board has no right to do what the Congress is powerless to do, and it is no answer to say that the Court is not passing on the right or wrong of the proposition, but simply the powers of the Board under a Congressional Act. Congress cannot deprive the courts of jurisdiction to review a challenge of the constitutionality of its own act if same deprives an individual of its property without due process of law.

The general scope of the prohibitions of the Fifth Amendment as against the Federal Government is frequently measured by the settled scope of the Fourteenth Amendment. This Court has proceeded on the assumption "that the legal import of the phrase 'due process of law' is the same in both amendments." In *Twining* v. *New Jersey*, 211 U. S. 78, the Court said (p. 101):

> "If any different meaning of the same words as they are used in the Fourteenth Amendment (and in the Fifth Amendment) can be conceived, none has as yet appeared in a judicial decision."

In *Heiner* v. *Donnan*, 285 U. S. 312, the Court said, at page 326:

> "The restraint imposed upon legislation by the due process clauses of the two amendments is the same."

The Switchmen's case does not hold that Congress has the power to deny individuals their constitutional rights. On the contrary, this Court has held that Congress cannot abdicate its duty to protect individual rights. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160; *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 79 L. Ed. 1570.

To the extent that there is conceived a "liberty of contract" under the due process clause of the Fourteenth Amendment, a similar "liberty" exists under the Fifth Amendment. While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. In *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923), citing *Slaughter House Cases*, 16 Wall. 36 (1873), the Court said:

> "While this Court has not attempted to define the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. *Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Italics ours.)

If the Switchmen's Union case could be used as a precedent or as controlling the instant case, the last act within the framework of the Railway Labor Act by which a minority could have any voice in its rights of pay, rules, or working conditions of employment would be when it casts its vote for the representative to act as its bargaining agent, and if in spite of that vote the Mediation Board can select a representative in the form of a labor union which excludes the minority from membership or any participation in the determination of policy, it would mean the relegating of the parties concerned to a voiceless minority in absolute

conflict with the apparent purpose of the Railway Labor Act.

If again the Mediation Board is to have the last word and subject to no judicial review, attention should be drawn to the fact that there are no standards set up for the representatives' conduct and this absolute lack of procedural safeguards of standards of conduct imposed upon the action of the representative once designated should be contrasted with the procedural safeguards established by Congress for the protection of the majority in the determination of the collective bargaining representative; i. e., certification of dispute, election, secret ballot, and certification to the carrier which the carrier is obligated to exclusively recognize.

Certain it is that Congress cannot and should not have the right of delegation to the Mediation Board of the designating to an unchosen majority of control over the jobs and livelihoods of the minority for same would amount to a constitutional interference with personal liberty and private property, and would be an arbitrary delegation in violation of due process. (It should here be noted that the redcaps would always be a voiceless minority as compared with the total membership of the clerical workers which would mean that the only available relief to them would be to give up their jobs.)

It is inconceivable that Congress, without setting up any standards, has thus put in the Mediation Board an unrestrained and arbitrary power to determine or destroy the working conditions of the minority. Conceding that the Mediation Board has the power to designate (1) craft or class, (2) who shall be the representative of the craft or class, and (3) that the carrier is bound to deal with the representative so designated exclusively, the fact that no standards are established for the conduct of the representative simply means the representative is free to destroy the minority's jobs at will. (Southeastern Carrier Conference agreement with firemen, February 18, 1941, and the Find-

ings of the President's Committee on Fair Employment Practices, November 18, 1943.)

Constitutional rights are individual rights and are not determined by the number of persons involved. *McCabe* v. *Atchison, et al., Railway,* 235 U. S. 151; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Mitchell* v. *U. S.,* 313 U. S. 80.

It is admitted that the Brotherhood of Railway & Steamship Clerks do not permit colored persons to become members thereof, and the only reason is that of color. It is further admitted that in this case they sought, and were certified as the bargaining agent for forty-five colored people who individually and collectively objected to their representation of them as bargaining agent and who had expressly designated the United Transport Service Employees of America as their choice as a bargaining agent. This is involuntary economic servitude, and we respectfully submit that such is obnoxious to the Thirteenth Amendment to the Constitution as constituting limitations on individual rights which pertain to the status of slaves rather than to free men and the Thirteenth Amendment in its prohibition of slavery is directed to individuals as well as states.

The Thirteenth Amendment:

> Section 1. "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."
>
> Section 2. "Congress shall have power to enforce this article by appropriate legislation."

In giving legislative aid to these constitutional provisions Congress enacted in 1866, under the authority of the Thirteenth Amendment, the following sections which were practically re-enacted after the adoption of the Fourteenth Amendment:

"Section 1977: All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce *contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." (Italics ours.)

Mr. Justice Bradley, speaking in the Civil Rights Cases, 109 U. S., page 3, said:

"Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth Amendment was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and no other."

From the foregoing it may be assumed that the power of the National Government by appropriate legislation to protect a right created by, derived from, or dependent in any degree upon, the Constitution of the United States, cannot be disputed. To deprive any person of a privilege inhering in the freedom ordained and established by the Thirteenth Amendment is to dprive him of the privilege inhering in the liberty recognized by the Constitution of the United States. Is the right to *contract* without restraint save by the general law of the land, operating on all alike, a right guaranteed to every citizen under the Thirteenth Amendment of the Constitution?

That answer has been practically had in all the cases in which the Supreme Court has spoken on this question. The decision of the Supreme Court in the above entitled case denies to the people of color the right to make their own contract at the instance of a labor organization certified by the Mediation Board.

It is no sufficient answer for the court to say we are not passing on the right or wrong of this matter. We are simply passing on the powers of the Mediation Board as created by Congress.

As above stated, we maintain that the constitutional right being involved, the Congress did not intend to take away such right, and if so, it was powerless so to do. Mr. Justice Harlan, in his dissenting opinion in *Hodges* v. *U. S.*, 203 U. S. p. 1, 51 L. Ed. p. 66, stated:

> "* * * I have already said that the liberty protected by the 14th Amendment against state action inconsistent with due process of law is neither more nor less than the freedom established by the 13th Amendment. . . . In Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832, we said that such liberty 'means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment *of all of his faculties; to be free to use them in all lawful ways; to live and work when he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*' All these rights, as this court adjudged in the Allgeyer case, are embraced in the liberty which the 14th Amendment protects against hostile state action, when such state action is wanting in due process of law. They are rights essential in the freedom conferred by the 13th Amendment. If, for instance, a person is prevented, because of his race, from living and working where and for whom he will, or from earning his livelihood by any lawful calling that he may elect to pursue, then he is hindered in the exercise of rights and privileges secured to freemen by the Constitution of the United States * * * "

If this unchallengable statement of Mr. Justice Harlan be correct, then unless the Negro worker be given opportunity under the terms of the Railway Labor Act to function in equal manner as all other individuals, the Act itself is unconstitutional and violative of due process of law as vouchsafed in the Fifth Amendment to the Constitution of the United States.

In this connection it is to be noted that the Railway Labor Act not only did not attempt to take away the common law right of individuals to individually contract for themselves, but it sought to add another right—giving them the right to collectively contract with their employers.

If the interpretation of this court stands, both rights are denied to Negroes. It is of no moment whether the constitutional right of Negroes to bargain or make contracts for themselves is taken away directly through the Statute or through the administration of same. Certain it is that the administration of this Statute is not equal when it comes to colored and white employees as applied in this case, and when inequality is designedly produced by Federal Officials in the exercise of their administrative power, the discrimination must meet the same constitutional test as a Statute by which the particular inequality is set forth, and such would be in derogation of the Fifth Amendment as taking property without due process of law.

Whatever the Statute may be upon its face, if the effect of it is to bring about inequality or to take property without due process of law, the courts will travel behind the Statute to see what is its true effect.

Yick Wo v. *Hopkins*. 118 U. S. 356; L. Ed. 30, 220.
Guinn v. U. S., 238 U. S. 347; 59 L. Ed. 1310.
Myers v. *Anderson*, 238 U. S. 368, 59 L. Ed. 1349.

CONCLUSION.

In conclusion we are of the opinion that if this interpretation of the Railway Labor Act prevails the plight of the Negro in the interstate railway labor field is hopeless. Congress has no greater power than the organic instrument under which it derives its existence, and whether we regard

this as a casus omissus or a deliberate attempt to deprive courts of jurisdiction, we submit that in the face of a constitutional issue Congress could not take away jurisdiction of the court, nor can the court abrogate its own jurisdiction and responsibility under the Constitution to protect the individual workers and their constitutional rights against arbitrary administrative action.

For the foregoing reasons the petitioners respectfully urge that a rehearing be granted and that upon further consideration that the order of December 6, 1943, reversing the judgment of the lower court in the above entitled cause be revoked.

Respectfully submitted,

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I, James A. Cobb, of counsel, for the petitioners, United Transport Service Employees of America, et al., do hereby certify that the foregoing petition for rehearing of this cause and for vacating the order reversing the judgment of the lower court is presented in good faith and not for the purpose of delay.

JAMES A. COBB,
Attorney for the Petitioners.